

Matter of Miller v City of New York

2010 NY Slip Op 31636(U)

June 24, 2010

Supreme Court, New York County

Docket Number: 102557/10

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER

IA PART 16
PART _____

Justice

Index Number : 102557/2010
MILLER, SYBRINA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
LEAVE SERVE LATE NOTICE OF CLAIM

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ proceeding for

leave to file a late notice of claim is granted in accordance with the accompanying memorandum decision.

UNFILED JUDGMENT
The judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141D)

Dated: JUN 24 2010



ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Application of
SYBRINA MILLER,

Petitioner,

Index No. 102557/10
Motion Seq. No. 001

-against-

THE CITY OF NEW YORK and NEW YORK
DEPARTMENT OF TRANSPORTATION,

Respondents.
-----X

SCHLESINGER, J.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).

Petitioner Sybrina Miller has commenced this proceeding for leave to serve notice of claim pursuant to General Municipal Law §50-e, subd. 5, or in the alternative, to amend the previously served notice of claim, which was timely served, to add a new theory of liability. Respondents the City of New York and New York City Department of Transportation have not offered any opposition.

Background

On April 25, 2009, petitioner was involved in a motor vehicle accident on the Madison Bridge in New York County. As petitioner was attempting to enter the Bridge, she turned onto a one-way lane that had traffic moving towards her and collided head-on with a New York City Transit Authority bus. Police officers responded to the scene of the accident, spoke with petitioner, and created a police report. (See Exh. E)¹. Petitioner was then transported by ambulance to Harlem Hospital, where she was treated for injuries that allegedly included torn cartilage in her hand, a torn ligament in her right ankle, a herniated disc in the cervical spine, and bulging discs in the lumbar spine. (See Affidavit of Sybrina Miller, Exh. D).

¹All referenced exhibits are attached to the petition, as no other papers were submitted.

On July 13, 2009, petitioner timely served the City of New York with a notice of claim, principally alleging negligence in the operation of the New York City Transit Authority bus. (Exh. C). Petitioner now seeks to amend her original notice, or to serve a new notice of claim and have it deemed timely. In her Proposed Notice of Claim, petitioner wishes to allege that she turned into the one-way lane on the bridge because the bridge displayed "no and or boarded up one way signs." (Exh. A). Among other things, she now alleges that she was injured and suffered property damage "solely due to the negligence, carelessness, recklessness, reckless disregard and deliberate indifference of the City of New York and New York City Department of Transportation in the manner in which they owned operated maintained, managed and controlled the [Madison Bridge], traffic patterns on the bridge, road markings, road signs and design of the subject area. (Exh. A).

Petitioner is Entitled to Leave to Serve a Late Notice of Claim

Pursuant to Gen. Mun. Law §50-e, subd. 1(a), a claimant commencing a tort action against a public corporation must serve and file a proper notice of claim within ninety-days after the claim arises. The related action or proceeding must be commenced within one-year and ninety-days of the event. Gen. Mun. Law §50-i. An application for an extension of time to serve a notice of claim may be made before or after the action has been commenced, but not after the one-year and ninety-day statute of limitations has run, unless the statute has been tolled. Gen. Mun. Law §50-e, subd. 5; *Nunez v The City of New York*, 307 A.D.2d 218, 219 (1st Dep't 2003). Since petitioner commenced this proceeding in February 2010, within one-year and ninety-days from the April 25, 2009 accident, her request is timely.

The next issue is whether leave should be granted to file the Proposed Notice of Claim pursuant to Gen. Mun. Law §50-e, subd. 5. In determining whether leave should be

granted after the ninety-day period, "the key factors considered are 'whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense. Moreover, the presence or absence of any one factor is not determinative.'" *Velazquez v City of New York Health and Hospitals Corp.*, 69 AD2d 441, 442 (1st Dept. 2010) quoting *Matter of Dubowy v. City of New York*, 305 A.D.2d 320, 321 (1st Dept. 2003).

Petitioner does not offer the Court any reason why she did not attribute the accident to improper signage in her original notice of claim, choosing instead to focus on actual notice to the City and lack of prejudice. Presumably, upon petitioner's further reflection she decided she wished to amend her claim, or the original omission was attributable to law office failure. In any event, "[t]he failure to set forth a reasonable excuse is not, by itself, fatal to the application." *Velazquez, supra*, 69 A.D.3d at 442.

Petitioner persuasively argues that the City had ample notice of the facts underlying her claim. "When considering a motion to extend the time for the service, the court must consider whether the public corporation acquired actual knowledge of the essential facts constituting the claim within the 90-day period or within a reasonable time thereafter, and whether, among other things, the delay in service substantially prejudiced the corporation in defending on the merits." Gen. Mun. Law §50-e, subd. 5. Here, the City was put on notice as they were timely served with the initial notice of claim. The police department responded to the scene of the accident and completed an accident report. (Pet. Exh. E). While the report itself does not include any claims about the signs, petitioner attests in her affidavit that she informed one of the officers that the signs were boarded up. In assisting

the petitioner, the police noted the time, date and location of the accident, and ambulance was called to take petitioner to the hospital due to her injuries. Under the circumstances, the Court finds that the City had actual notice of the necessary facts. See, *In re Sokolowski*, 173 AD2d 239 (1st Dep't 1991)(possession of accident report with details of occurrence constituted actual notice).

The final consideration under Gen. Mun. Law §50-e(5) is whether the City would be prejudiced in its defense were petitioner permitted to proceed with her claim despite filing a late notice of claim. Here, the Court finds that the City would not suffer any prejudice from the delay if forced to defend against petitioner's new claim. Not only did the police have an opportunity to inspect the area and speak with any witnesses, but the City had ample opportunity to investigate when it was timely served with the original notice of claim. Further, petitioner's counsel asserts that the bridge had been renovated at or about the time of the accident and that much information about the work was available on-line. (Exh. G). The City has not disputed any of these claims, nor provided the Court with any opposition to the petition.

Accordingly, it is hereby

ADJUDGED that this petition for leave to serve a late notice of claim is granted, and the notice of claim is deemed timely served in the proposed form annexed to the moving papers as Exhibit A upon petitioner's service on respondent of a copy of this decision with notice of entry.

This constitutes the decision and judgment of the Court.

Dated: June 24, 2019

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).
[Signature]
ALICE SCHLESINGER